No. 87-1799

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In The

Supreme Court of the United States

OCTOBER TERM, 1987

NOBEL SCIENTIFIC INDUSTRIES, INC.,
Petitioner,

v.

BECKMAN INSTRUMENTS, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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NOW COMES COMPETITIVE AMERICAS PROJECT, BY ITS ATTONERY, HOWARD FRIEDMAN, A MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES:

COMPETITIVE AMERICAS PROJECT hearby respectfully requests leave to file the attached brief AMICUS CURIAE in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The opinion of the Court Of Appeals in this case is reported at 831 F.2d. 537 (4th Cir. 1987) and the opinion of the District Court for the District of Maryland is reported at 670 F. Supp. 1313 (D. Md. 1986).

The issues present in the instant case clearly transcend the narrow parties' interests. Having an interest in the harmonious evolution of trade and commerce dispute resolution among the trading partners of the United States, the Competitive Americas Project is concerned with the orderly development of domestic enterprise law affecting such competition. The petition to this Court for grant of Writ Of Certiorari in this case presents several meritorious issues to this Court for review. One of which is of paramount importance to retain coherence in the body of antitrust law with respect to the prohibition of unlawful tying arrangements and thereby, American competitiveness.

From the opinion of the Court below, it is readily apparent that the Court, in granting respondent's Motion For Summary Judgment, aquiesed in respondent's insistence that the petitioner's *per se* tying claims necessarily required a showing of respondent's Sherman 2 monopoly power: that respondent was a monopolist in the legally defined relevant market; that petitioner's claims of unlawful tying must be judged under the rule of reason.

The lower Court's opinion focuses almost solely on that Sherman 2 approach to the petitioner's tying and other claims in this case. In so doing, although the case may present little, if any, factual dispute, it is easy to lose sight of the fact that the claims of petitioner, when considered as claims of *per se* unlawful tying, easily do meet the standards of the *per se* evaluation of tying arrangements to establish illegality. This results because the lower Court's factual analysis, as presented in its opinion, is skewed to that monopoly approach to this case.

The case presents certain unusual factual circumstances which, if properly considered under the rule of reason, would have resulted in denial of the summary judgment motion. One of which is that the Court below overlooked the fact that the tying schemes abetted a profit-transfer mechanism to avoid federal income taxes. Another is that the Court's rule of reason analysis, holding that tying schemes involving patented products are not illegal unless the patents grant monopoly power - the exclusive monopoly over the product as well as related products. This anticipates proposed legislation now

pending in Congress to the same effect.

The brief of Amicus Curiae is intended to bring greater focus on this issue; its belief is that this additional emphasis will benefit this Court in its deliberations.

Respectfully submitted,

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NOBEL SCIENTIFIC INDUSTRIES, INC.,
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BECKMAN INSTRUMENTS, INC.
Respondent.

BRIEF OF COMPETITIVE AMERICAS PROJECT AMICUS CURIAE IN SUPPORT OF NOBEL SCIENTIFIC INDUSTRIES, INC.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

INTEREST OF AMICUS CURIAE

The issues present in the instant case clearly transcend the narrow parties' interests. Having an interest in the harmonious evolution of trade and commerce dispute resolution among the trading partners of the United States, the Competitive Americas Project is concerned with the orderly development of domestic enterprise law affecting such competition.

STATEMENT OF CONSENT OF THE PARTIES

This brief is filed with the written consent of Petitioner. Its letter of consent is on file with the Court, pusuant to Rule 28 of this Court. Respondent refused consent.

SUMMARY OF ARGUMENT

This is a Clayton 3/Sherman 1 tying case in which the lower court, in granting summary judgment against petitioner, abandoned the *per se* rule - which requires a showing of *market power* - in favor of a *rule of reason* evaluation standard that required a showing of respondent's Sherman 2 *monopoly power*. Although all of the essential elements of a *per se* violation of the Clayton 3/Sherman 1 prohibition of tying arrangements were manifestly demonstrated to be present in the instant case - certainly sufficient to preclude the grant of summary judgment as a matter of law - the Court below improperly acceded to respondent's insistence that petitioner's Clayton 3/Sherman 1 tying claims "must be judged under the rule of reason" and require a showing that respondent was a monopolist in a legally defined relevant market. This is clearly contrary to this Court's most recent reaffirmation of the *per se* condemnation of tying arrangements in *JeffersonParish*[1] Moreover, the lower Court's decision in the instant case is directly contrary to the decision of the Appeals Court for the Ninth Circuit in *Digidyne v. Data General* which presented similar factual circumstances and the identical legal issue as is present in the instant case[2].

By way of example, although both Courts relied on this Court's holding in *Jefferson Parish* and *Fortner II*[3], in the instant case, the court below held that unless the twenty-two patents, covering the various parts and sub-assemblies of respondent's tying products, covered "the whole product, economic power cannot be assumed". The Court below held that only if the patents give "the exclusive monopoly over a product, including over related products, then economic power will exist[4]". The Ninth Circuit held to the exact opposite. In *Digidyne*, the Appeals Court held in that Clayton 3/Sherman 1 tying case, that "Possession by the seller of such monopoly power is sufficient to establish *per se* illegality, but it is not required[5]".

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[1] *Jefferson Parish Hosp. Dist.No. 2 v. Hyde* 466 U.S. 2 (1984)

[2] *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985).

[3] *United States Steel Corporation, et.al. v. Fortner Enterprises, Inc., [Fortner II]* 429 U.S. 610 (1969) at 620

[4] 670 F.Supp. 1313 (D.Md. 1986) [15] at 1328

[5] 734 F.2d 1336 at 1339-1340

Moreover, even assuming, *arguendo,* that a rule of reason approach were appropriate in the instant case, the Court below then improperly ignored the plainly "harmful excercise of market power" abetted by respondent's tying schemes that was manifestly present in the instant case; namely, 1) tying schemes which exploited consumers (American hospitals) through price discrimination - the hospitals being forced to pay vastly inflated prices (400%-800% over the competitive price) for commodity supply items, 2) tying schemes which promoted economic inefficiency by forcing sellers of the tied products to try to enter into the tying product business of the respondent in order to sell their brands of the tied products, and 3) tying schemes which were plainly constructed as a clandestine profit-transfer mechanism-to transfer respondent's profits from the tying products, manufactured in the United States, to the tied products, manufactured in the Commonwealth of Puerto Rico-in order to avoid the payment of federal corporate income taxes. Clearly, this is contrary to the unanimous[6] holding of this court in Jefferson Parish.

The effect of the court's decision is to judicially repeal Section 3 of the Clayton Act in favor of a Sherman 2 analysis of monopoly power under the rule of reason. The decision thus anticipates proposed legislation (HR-557[7]) that has not yet been able to be passed in the congress - perhaps never will be - and circumvents the very purpose of other tax legislation that congress has, in fact, passed (Public Law 94-455[8]). Moreover, the decision encourages economic coercion in an industry - health care - that, by its very nature and structure, necessarily has, already, too little competition.

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[6] 466 U.S. 2 n. 19 at 13; n. 3-4 at 35-36

[7] HR 557, if it were to pass into law, would require *inter alia,* that tying involving patented tying products would be evaluated under the rule of reason and that single damages only could be awarded. This legislation, introduced January 8, 1987, has not moved out of the House Sub-committee on Monopolies and Commercial Law.

[8] In 1976, Congress passed legislation (Public Law 94-455) that provides a tax exemption on profits earned on products manufactured in the Commonwealth of Puerto Rico. This legislation was specifically designed to stimulate the Puerto Rican economy and thereby relieve its severe and chronic unemployment. To some limited extent this legislation has been successful; but to the great consternation of congress, it has been much abused. Amid intense lobbying to retain this tax exemption intact, the congress has struggled - in large part unsuccessfully - to curb the effect of profit-transfer schemes such as are present in the instant case. Pharmaceutical-chemical companies (about 50) comprised about 10% of all manufacturing companies in payroll but received about 50% of the total tax benefits

The effect of the court's decision - based, as it is, on the rejection of established precedent and accompanied, as it is, by a selective reading of the evidence which was directed solely toward the analysis of respondent's monopoly power (clearly contrary to Rule 56) - is seen, therefore, to be at least as much political as it is judicial. As Justice Brennan's concurring opinion to the opinion[9] of this Court in Jefferson Parish indicates, such a decision improperly intrudes into the political process and tends to erode the separation of powers.

The decision of the Court below, granting summary judgment in the instant case, therefore urgently requires the intervention of this Court to restore coherence to the antitrust laws' prohibition of tying arrangements where their effect[10] "may be to substantially lessen competition or tend to create a monopoly", and to insure that the mandate of the seventh amendment to the constitution shall be observed in summary judgment proceedings[11] .

ARGUMENT
INTRODUCTION

This is a tying case[12] in which the court below granted summary judgment against the petitioner. In its opinion, the court below repeatedly emphasized that the case presented a virtual absence of any factual dispute between petitioner, Nobel Scientific Industries, Inc. (Nobel), and respondent Beckman Instruments, Inc. (Beckman);

(nearly $2 billion) in 1982, the last full year for which there are data. This represented about $70,000 in tax exemption per worker employed which is over three times the wages paid. See, The Operation and Effect Of the Possessions Corporation System of Taxation, Fifth Annual Report, Department of the Treasury, 1985, pp. 1-5, 53, and Appendix Table B-3. Also see generally, the first four Annual Treasury Department Reports; 1978, 1979, 1980, and 1982.

9 466 U.S. 2 at 37

10 In *Jefferson Parish*, this Court has unequivocally held that the congressional finding on the anticompetitive effects of tying that underlay its intent in enacting the Clayton Act "must be respected" *id* at 9

11 The mandate of the seventh amendment is plainly stated; the right of trial by jury "shall be preserved."

12 In its complaint, Nobel alleged that Beckman had tied the discounted pricing and availability of its patented automated blood chemistry analyzers and the parts and services required for their ongoing operation that were under its control, to U.S. hospitals' agreement to accept Beckman's brand of the reagents (chemical REaction AGENTS) that these analyzers also needed for their ongoing operation. Nobel also claimed that Beckman charged vastly inflated prices (on average, 600%) over those

the dispute between the parties was legal, not factual. 670 F. Supp. 1315, 17, 19; 831 F. 2d. 538 Although there are claims in the instant case of an unlawful refusal to deal [13] which may, or may not, need to be considered under Sherman 2 as an act of monopolization, there can be no dispute that this case is, at bottom, a Clayton 3/Sherman 1 tying case [14] .

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available from reagent manufacturers like Nobel and others. *See,* n. 25,*infra.The principal blood chemistry analyzer involved in this suit is Beckman's computer-controlled "ASTRA", which is an acronymn for "Automated STat/Routine Analyzer", and which is a uniquely identifying designation for Beckman's brand of chemistry analyzers. It refers to their undisputed unique automated capability to switch back and forth from doing routine tests to do "stat" tests. (Stat from the Latin, statim,* immediately) Stat tests are typically required in emergency life-threatening situations. Beckman had insisted that this unique attribute was the key feature which accounted for these analyzers' "enthusiastic" reception and their "outstanding commercial success".[AP: 1795]

[13] In June, 1979, Nobel ordered an "ASTRA" blood chemistry analyzer from Beckman. Beckman refused to honor the order and ultimately admitted that this was specifically done in an attempt to exclude Nobel as a competitor in the sale of the reagents that are required for use on this analyzer. [AP: 836-837] Beckman subsequently also touted Nobel's lack of having this analyzer in-house to potential customers. [AP:238]In December, 1980, Nobel brought suit alleging, *inter alia,* that Beckman's refusal to deal - motivated by an anticompetitive purpose and having an anticompetitive effect - was unlawful under the antitrust laws.

[14] Beckman acknowledged the basis of Nobel claims, as were presented in Nobel's *prima facie* case in 1984,*[See* notes 15, 16 *infra]* identifying them as follows: [P]laintifff claims that it has made a *prima facie* showing that Beckman is guilty of a monopolization or attempt to monopolize the "market" for reagents used on the Beckman benchtop and ASTRA blood chemistry analyzers, allegedly illegal under Section 2 of the Sherman Act, 15 U.S.C. b.*"tying arrangements" allegedly illegal under Section 1 of the Sherman Act and/or Section 3 of the Clayton Act, 15 U.S.C. 1, 14*;c. a unilateral refusal to deal alledgedly illegal under Section 1 of the Sherman Act, 15 U.S.C. 1. [AP: 395] Beckman further stated in its memorandum that: ....[p]roof of Beckman's *monopoly power* in a legally defined relevant antitrust market is a required element of each of the plaintiff's claims. [AP: 397-398] Since plaintiff has been proceeding on the erroneous assumption that it had no obligation even to define a relevant tying product market, no market theory by which Beckman may conceivably be considered a *monopolist* has been articulated with respect to plaintiff's tying claims in this case. [AP: 419](emphasis added)

Nobel had argued early-on (before *Jefferson Parish)* that its tying claims under Section 3 of the Clayton Act[15] and/or Section 1 of the Sherman Act[16] were properly considered as being allegations of *per se* violations of the antitrust laws. Nobel also maintained that, in the circumstances that were present in the instant case, no further inquiry into actual market conditions - was required to establish Beckman's liability[17] ; specifically, no full-scale inquiry into actual market

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[15] In support of its Motion For Order To Compel Production of Documents (December 1983), [AP: 801-828, 838-855] Nobel had maintained that to the extent Beckman's tying arrangements essentially involved goods, they were *per se* unlawful under Clayton 3. Nobel argued that this necessarily obtained, relying on this Court's holding in *Times-Picayune Publishing Co. v. United States* 345 U.S. 594 608-609 (1953). Nobel also cited *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d. 55 (4th Cir. 1969), *cert. denied.* 397 U.S. 920 (1970) in which the Court, relying on this Court's holding in *Times-Picayune,* held, that, under the Clayton Act, the direct observation of a seller's "successful imposition of a tying arrangement on a substantial amount of commerce" does not require "a separate showing of the seller's economic power" as does Sherman 1. 415 F.2d. at 62.

[16] Nobel had further maintained that to the extent Beckman's tying arrangements essentially involved either goods and/or services, they were also unlawful, *per se*, under Sherman 1. Nobel argued that this necessarily obtained, relying, *inter alia*, on this Court's holding in *United States v. Loew's* 371 U.S. 38 (1962) that economic power in the tying product may be found on the basis of 1) patents and/or 2) consumer appeal and/or 3) uniqueness in the tying products' attributes. 371 U.S. at 47-48 Beckman's analyzers were covered by 22 patents. This Court has repeatedly held that "[t]he existence of a valid patent on the tying product, *without more,* establishes a distinctiveness *sufficient to conclude* that any tying arrangement involving the patented product would have anti-competitive consequences." *United States Steel Corp. v. Fortner Enterprises [Fortner II]* 429 U.S. 610 (1977) n. 12. (emphasis added) Although this Court has intimated that there may be "rare circumstances" where the *Loew's* doctrine flatly "prohibiting tying arrangements involving patented products" is inapplicable, the Court allowed that it found it difficult to "conceive of such a case". 371 U.S. at 47 Moreover, this Court had already held in *Standard Stations* that "[A] patent, moreover, although in fact there may be many competing substitutes for the patented article, is at least *prima facie* evidence of such control". *Standard Oil Co. of California v. United States* 410 U.S. 293, 307 (1949).

[17] It is well-established that, by definition, *per se* unlawful tying encompasses three essential elements: 1) separate products, tying and tied; 2) substantial commerce being restrained in the tied product; and 3) sufficient economic power in the tying product so as to be held likely to cause forcing. See, for example, *Digidyne,* 734 F. 2d. [1] at 1338. In *Jefferson Parish,* this Court again held that, with respect to the definition of tying, the standards under Clayton 3 and Sherman 1 are the same. 466

conditions - which full-scale inquiry is the necessary predicate [18] conditions - which full-scale inquiry is the necessary predicate for relevant market definition and analysis - was required in the instant case to establish Beckman's liability under Clayton 3 and/or Sherman 1 for its tying schemes [19] .

Beckman, on the other hand, in bringing its motion for summary judgment, insisted that Nobel's tying claims "must be judged under the rule of reason" [AP: 1851] Beckman had argued that all of Nobel's claims - including its tying claims under Clayton 3 and Sherman 1 - required proof of Beckman's monopoly power - that Beckman was a monopolist in the legally defined relevant market. Beckman essentially

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U.S. 2 n. 39. In the instant case, only the third element, market power, is at issue. If it were the intent of this Court, in *Jefferson Parish*, to reverse its holding in *Times-Picayune*, (*see*, note 15, *supra*) and to now hold that the proof-standard for market power under Clayton 3 be subsumed under the Sherman 1 market power proof-standard. The clear evidence of the successful imposition of the tying restraints on a substantial amount of commerce then, while not sufficient in itself to establish market power under Clayton 3, nonetheless remains as evidence of market power, under both statutes, when taken together with such other evidence of market power as is present in the instant case.

[18] This Court has appositively defined *per se* condemnation in *Jefferson Parish* as being "condemnation without inquiry into actual market conditions". 466 U.S. 2 at 15. It is when the seller does not possess the degree or kind of market power that enables him to cause forcing, that "...[e]vidence of an vnreasonable restraint on competition in the relevant market" is required. *id* at 20

[19] However, Nobel did, in fact, define the relevant market in this case. It presented extensive analysis identifying the economically relevant delimiting factors that define the relevant product markets in this case, in connection with its showing of the precise extent of Beckman's market dominance, as an additional *indicium* of market power, in support of Nobel's *per se* tying claims under Sherman 1; and further, to show the precise extent of Beckman's monopoly power in order to also establish Beckman's liability under Sherman 2. In brief, the relevant tying product market (at its broadest) consists of all analyzers capable of doing at least one of the unsubstitutable state-chemistry tests that Beckman's did; and the tied product market consists of those reagents required for doing these tests. On this basis, Beckman's analyzers (its ASTRA alone - within five years of its introduction) were doing more of these tests than all other analyzers combined and Beckman maintained over 50% of the market for the reagents used to do these tests. Moreover, within five years, Beckman's analyzers were outselling their closest competitor's by almost two-to-one. [AP: 1841-1843, 2054-2074]

did not dispute either the legal, *see* note 14, *supra,* or the factual basis of Nobel's claims - that Beckman's tying schemes were specifically designed and directed at reagent competitors like Nobel[20] ; Beckman's defense for its tying schemes was that they were legitimized by its interest in protecting its goodwill (i.e. its profitability) - supposedly now given blanket-sanction by this Court in *Fortner II*[21] . Beckman's basic contention in support of its summary judgment motion was that Nobel had failed to properly demonstrate the legally defined relevant market, a failure which Beckman maintained was a fatal flaw infecting all of Nobel's claims. [AP: 1851]

The principal legal dispute in this case then is a) whether Nobel's tying claims are subject to evaluation under Clayton 3 and/or Sherman 1 for *per se* illegality, as Nobel contends (*see,* notes 15, 16, *Supra*); or b) whether Nobel's Clayton 3/Sherman 1 tying claims must be evaluated under the rule of reason and require a showing that Beckman has had monopoly power in the legally defined relevant market - i.e. was a monopolist - as Beckman contends - a position which the Court below clearly adopted as its own. [*See,* note 14, Supra] Ancillary to this principal legal dispute is a dispute as to the proper evaluation of Nobel's tying claims under the rule of reason [*See,* II, *infra*]

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20 In opposing Nobel's Motion For Order to Compel Production Of Documents [*see,* notes *15-16,* supra], Beckman maintained that: [I]n the present case it is undisputed that Beckman typically charges a higher price for the alleged tied product-reagents-than do its competitors. However, Beckman also offers competitive packages through its ESP+10 program which include discounted prices on expendable supplies or service contracts where the customer agrees to purchase Beckman reagents. Nobel has made no showing that these packages *as a whole* are not competitively priced. In fact, the evidence is to the contrary, and shows that the object of ESP+10 was to package discounted goods and services with Beckman reagents to permit Beckman to compete against price cutting by reagent competitors like Nobel... This is precisely the type of competitive conduct expressly sanctioned by *Fortner II.* [AP: 416]

21 Beckman further maintained that: [B]eckman's ability in some instances to charge higher prices than its competitors for ASTRA reagents and supplies is evidence not of Beckman's monopoly power, but rather of the inherent advantage of the OEM in competing against reagent suppliers like Nobel. According to ASP witnesses it is customary for the OEM to be able to charge a higher price for its reagents. Beckman has a legitimate interest in protecting the goodwill and integrity of its system and in establishing a pricing structure designed to encourage customers to look to Beckman for all components of the system, as well as to facilitate efficient maintenance. [AP: 416-417]

This brief of amicus curiae will discuss, *seriatim,* these legal issues in the factual context presented in the instant case in support of its argument urging this Court to grant the Petition For Writ of Certiorari.

I. Contrary to this Court's most recent reaffirmation of the *per se* rule in *Jefferson Parish,* the Court below, in granting respondent's summary judgment motion, improperly abandoned the *per se* rule and evaluated the petitioner's Clayton 3 and Sherman 1 tying claims under a rule of reason that required a showing of respondent's Sherman 2 monopoly power

In its opinion, the Court below acknowledged several times that Beckman's analyzers enjoyed enormous consumer appeal; the Court held that the evidence showed that Beckman's analyzers were "popular", "highly regarded" and that "There is no question that the ASTRA analyzers were very successful and considered among the best in the industry." 670F.Supp.1319, 1328. But contrary to this Court's most recent reaffirmation of the long-settled principle of *per se* condemnation of tying arrangements in *Jefferson Parish* [See also, the concurring opinion of Justice Brennan to the opinion of this Court in *Jefferson Parish,* 466 U.S. 2 at 27] the Court below held that it was unpersuaded that the plain evidence of overwhelming consumer appeal - enhanced by uncontradicted customer testimony that Beckman's analyzers were perceived as being unique [AP: 1609] - coupled with the fact that Beckman's analyzers were covered by 22 patents, as well as the apparent fact that thousands of U.S. hospitals had succumbed to Beckman's tying schemes and thereby paid vastly higher prices (400%-800% above the competitive price) for their reagents [*see,* note 25, *infra],* could support the ultimate factual conclusion under Sherman 1 and/or Clayton 3 that Beckman's analyzers were sufficiently unique so as to be reasonably held to possess what this Court has variously characterized in *Jefferson Parish* as being, the "leverage", "sufficient economic power", or "market power" that is likely to cause forcing in some substantial amount of commerce and thus incur the antitrust laws' *per se* condemnation.

Although the Court below cited (as did the 9th Circuit Court in *Digidyne,* 734 F.2d. 1336 at 1339) this Court's holding in *Fortner*

II, 429 U.S. 610 at 619, to the effect that a showing of *per se* unlawful tying does not require that a monoply position - or even a dominant position - be demonstrated thoughout the market for the tying product, 670 F.Supp. 1328; nonetheless, it is readily apparent that the Court below equated leverage - market power, or sufficient economic power to be held likely to cause forcing in some substantial amount of commerce - to be the equivalent of Sherman 2 monopoly power. This is apparent, not only in its Clayton 3 analysis [*id* at 1327-28] in which the Court held that its "prior analysis" did not show economic power (where the lower Court's "prior analysis" specifically refers to its prior Sherman 2 monopoly power analysis), but also in its analysis of economic power under Sherman 1 as well.

This is most clearly shown in the Court's analysis of the patent coverage that Beckman's analyzers had - twenty-two patents. Here, the Court, apparently relying on the separate opinion of Justice O'Connor to the opinion of this Court in *Jefferson Parish*, 466 U.S. 2 n 7 at 37, held that unless a patent covers the "whole product," and gives "the exclusive monopoly over a product, including over related products", then economic power cannot be assumed. The "exclusive monopoly over a product, including over related products" does indeed give economic power. However, that power is Sherman 2 monopoly power. To hold that Clayton 3/Sherman 1 market power must be shown to be equivalent to Sherman 2 monopoly power is clearly contrary to this Court's long-held statutory interpretation of the antitrust laws' ban on tying as a *per se* unlawful offense.

The Court below relied on this Court's holding in *Fortner II,* 429 U.S. 610 at619, for the proposition that the statutory grant of a patent monopoly in *United States v. International Salt,* 332 U.S. 392 (1947) gave, in that case, the exclusive right over the product, including over related products, 667 F.Supp. 1313 at 1328; but that was not this Court's holding in *Fortner II.* More to the point, the fact of the matter is, that, in *International Salt* - as this Court clearly pointed out in *Northern Pacific Railway Co. v. United States,* 356 U.S. 1 (1958) n. 8 - there were other salt dispensing machines readily available that were considered as being satisfactory substitutes for International Salt's machines. But that fact, although specifically considered by this Court, was deemed to be irrelevant.

What this Court did hold in *Fortner II* was that these statutory monopoly grants "...[r]epresented products that the Court regarded

as *sufficiently* unique to give rise to a presumption of economic power." 429 U.S. 610 at 619 (emphasis added) To reinforce the point just made, this Court, in *Fortner II,* cited *Loew's* to the effect that "...[t]he existence of a valid patent on a tying product, *without more,* establishes a distinctiveness *sufficient to conclude* that any tying arrangement involving the patented product would have anticompetitive consequences. *United States v. Loew's, Inc.* 372 U.S. 38" *id* at n. 12 (emphasis added) Moreover, in *Jefferson Parish*, this Court once again cited this holding of *Loew's*. 466 U.S. 2 at 16.

Although it is apparent that the Court below would construe this citation, taken in its context in *Jefferson Parish,* to mean that the antitrust plaintiff must establish that the defendant is attempting to monopolize a market[22], this Court has never held that patents must confer "the exclusive monopoly over a product, including over related products" in order to establish the existence of market power in a *per se* tying case. To the contrary, this Court has consistently held that the existence of a valid patent creates a presumption of sufficient economic power to make anticompetitive forcing, in some substantial amount of commerce, probable. Even if Beckman had represented (Beckman did not) and could ultimately show (at jury trial) that none of their twenty-two patents on their analyzers, taken alone and together, gave them an advantage over copetitors (in which case, the question naturally occurs, why did they then even both to obtain and claim coverage under these patents), nonetheless, at summary judgment, at least the presumption of these patents' validity, and hence, their economic power must obtain[23]. As noted *supra,* n. 16, in *Standard Stations,* this Court had already (prior to *Loew's*) held that "A patent, moreover, although in fact there may be many competing substitutes for the patented article, is *at least prima facie evidence* of such control". 410 U.S. 293 at 307 (emphasis added)

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[22] This is, precisely what the 4th Circuit Appeals Court did hold with respect to Nobel's claims; the 4th Circuit Court held that the basis of Nobel's claims was an alleged attempt to obtain a monopoly. 831 F.2d. 537 at 537-538

[23] Unlike the *Digidyne* Court, which noted that the defendant in that case was litigious with respect to the defense of its proprietary rights, 734 F.2d. 1336 (1984) at 1342, the Court below apparently did not attach any significance to the fact that Beckman is notoriously litigious in the prosecution and defense of its patents. The Court below had been apprised of the fact that Nobel, wishing to market an ASTRA reagent on which Beckman had obtained a patent, had filed Reexamination Request No. 90/000,065 in the U.S. Patent Office on Beckman Patent No. 4,330,296 (Jain

In further support of its factual finding, in this summary judgment proceeding, that Beckman's patents did not confer the presumption of sufficient economic power likely to cause forcing under Sherman 1, the Court below held that "There is no dispute, and can be none, that many manufacturers make analyzers that do the identical chemical tests, *and can do identical operations. The method may be different, but the result is the same.* "670 F. Supp. 1313 at 3128 (emphasis added) And indeed, there was no dispute that Beckman's analyzers' capability to do the stat-chemistry tests was shared by many analyzers. However, to whatever extent that any analyzer manufacturer had any capability at all to do any of the stat-chemistry tests that Beckman's analyzers did, Nobel identified all of them - fifteen analyzer manufacturers by name and thirty-four of their analyzers by analyzer model - to show what that precise extent actually was. [AP: 1841-46, 2054-2074] But for the Court to say that other analyzers did "identical operations" because the "result is the same" - (although) the "method may be different" - goes beyond proper Rule 56 summary judgment procedure; because, as will be shown presently, it denies the plainly reasonable inference that Beckman's analyzers possessed an economically relevant "unique attribute" that fully supports the showing of Clayton 3/Sherman 1 market power, in favor of a contrary inference to support the notion that Beckman's analyzers did not possess Sherman 2 monopoly power.

Beckman, itself, had adamantly insisted that its computer-controlled ASTRA analyzers possessed a unique attribute; namely, the *automated* capability to switch back and forth between routinely doing the stat-chemistry tests and doing the stat-chemistry tests on the stat basis (i.e. immediately, usually in emergency life-threatening situations) when required to do so. It was specifically this unique

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et al). This was a reagent formulation-and-method patent that Beckman had procurred for use on its ASTRA analyzers. Nobel, in this reexamination procedding, pointed out, *inter alia,* that Beckman had failed to disclose prior art that had been published in the leading scientific journal in the field and which had identically disclosed the reagent formula on which Beckman obtained the patent. The patent examiner agreed and rejected the Beckman claims. See also, *Beckman Instruments, Inc. v. Chemtronics, Inc.* 428 F.,2d. 555 (5th Cir. 1970), cert denied, 400 U.S. 956 (1970) in which, the Court, in that case, found Beckman guilty of fraud for failure disclose prior art. See also, *ASTRA Pharmaceuticals, Inc. v. Beckman Instruments, Inc.,* 718 F.2d. 1201 (1st Cir. 1981) in regard to the ASTRA trademark

attribute - not present on any otherwise - competitive machine - that Beckman claimed was the principal reason why its analyzers' had been "enthusiastically received" and (for at least five years)enjoyed "outstanding commercial success". [AP: 1795] However, the Court cited testimony from Beckman employees (only) to the effect that other analyzers did have the ability (both before and after the ASTRA was introduced in 1978) to interupt routine testing and do emergency stat testing. 670 F. Supp. 1313 at 1320. However, as will be shown presently, the Court either did not comprehend the significance of, or disregarded, as being economically irrelevant, the fact that no other analyzer had the *automated* capability to do this.

Although the Court stated that "the parties do not debate the facts", id at 1319, this is not at all the case in this instance and specifically, with respect to this Beckman-employee testimony. Nobel had indeed objected - in the strongest possible terms - that the testimony (or at least the inference that Beckman originally urged the Court to draw from this testimony) was, at best, misleading, [AP: 1545-47] Besides (most importantly) being clearly inconsistent with uncontradicted customer testimony [AP: 1609] that clearly indicated that customer perception was that the ASTRA was indeed unique (as late as 1985 - seven years after the ASTRA was introduced) - Nobel showed that Beckman's employee-testimony also stood in stark contrast to the unequivocal representations that Beckman had made with respect to this very issue of uniqueness to the U.S. Court of Appeals for the 1st Circuit in 1983 in trademark litigation with the ASTRA Pharmaceuticals Company. *ASTRA Pharmaceuticals Inc. v. Beckman Instruments, Inc.,* 718 F. 2d 1201 (1st Cir. 1983).

> "Indeed, the "stat/routine" feature is one of the major, if not *the* major, selling points of the Beckman ASTRA analyzer, and it refers to the ability of the analyzer to swtich automatically back and forth between performing numerous *routine* blood tests and handling special *stat* (i.e., immediate, usually in life-threatening situations) blood tests... No competitive machine on the market has this "automated state/routine" capability..."
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> [AP: 1975, emphasis in original]

After Nobel had objected that this Beckman employee-testimony (which the Court below had cited in its opinion, 670 F. Supp. 1313 at 1320) was, at best, misleading, Beckman maintained that the employee-testimony - to the effect that other instruments did have stat-interrupt capability - was "completely consistent" [AP: 1872] with its

representation above; the difference being that the employee-testimony (as cited by the Court) was not made in reference to the "Automated Stat/Routine Analyzer" as above; but rather, just to the "stat routine feature". In effect, Beckman had indicated through this semantic legerdemain that it considered "manual" interruption on otherwise - competitive analyzers to be both the technical and economic equivalent of "automated " interruption on its ASTRA; but it was specifically this automated ro ASTRA capability Automated Stat/Routine Analyzer) that Beckman insisted was the unique feature absent from all otherwise-competitive analyzers-that accounted for their ASTRA analyzers' enthusiastic reception and their outstanding commercial success. [AP: 1595] Nobel had also pointed-out to the Court below that manual interruption of an anlyzer, while routinely doing the stat-chemistry tests, to stop and do the occasional emergency stat request, was certainly not economically equivalent to the (automated) stat-interrupt capability that was present of the ASTRA: nor, in most cases, was it even technically feasible [24] .

Although the court below acknowledged that Beckman's analyzers enjoyed enormous consumer appeal, that they were heavily patented , and that Beckman's customers were paying far in excess of what they would have paid for reagents, absent the tying (on average, 600%, *see,* n. 25, infra); yet, it was solely on its factual finding - that Beckman's analyzers were not "so unique" that they could not be replaced by other analyzers - that the Court's decision to grant summary judgment on Nobel's tyng claims under Clayton 3 and Sherman 1 was totally based. It is quite clear, however, that the degree or kind of uniqueness that the Court was looking for in the instant case, was not uniqueness in the sense of a tying product that possesses a "unique attribute" so as to be held likely to "appreciably restrain free competition in the market for the tied product", i.e. as set-out by this Court in *Loew's,* 371 U.S. 38 at 45; but, rather,

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24 Arguably, washing clothes on a wash board is, in some sense, technically equivalent to washing them in a washing machine. The Court below held that "[T]he method may be different but the result is the same." [*id* at 1328] However, the factual issue is not whether, in some sense, they are technical equivalents, but rather, whether they are economic equivalents - i.e. relevant economic substitutes. There was no dispute that time - and technology - marches on and that technology is a relevant determinant of demand. This is particularlyu true in hospitals which need to maintain their facilities current with state-of-the-art methods and equipment.

uniqueness so as to constitute monopoly power in the Sherman 2 sense[25]. However, it is precisely this degree or kind of uniqueness that that Sherman 2 monopoly power (if shown to be present) *can, but need not,* subsume the Clayton 3/Sherman 1 market power standard. In the instant case, the Court below held that unless a patent (in the instant case, the 22 patents) covers the "whole product" and gives "the exclusive monopoly over a product, including over related products", then economic power cannot be assumed. In *Digidyne,* the Court specifically held that "Possession by the seller of such monopoly power is *sufficient* to establish *per se* illegality, *but it is not required*". 734 F. 2d 1336 at 1339-1340 (emphasis added
The difference between these two proof-standards adopted by the 4th Circuit and the 9th Circuit Courts, respectively, is fundamental. In arriving at their respective decisions, however, both Courts were relying on this Court's holding in the same cases - most notably, *Fortner II* and *Jefferson Parish.*

Clearly, this urgently requires the intervention of this Court to restore coherence to the antitrust laws' ban on tying arrangements. Without such intervention, the antritrust plaintiff, in bringing a tying case, is totally dependent on the luck of the draw - on the various views of the lower courts with respect to what constitutes sufficient economic power in a tying case brought under Clayton 3 and/or Sherman 1. This cannot conceivably be held to be consonant with this Court's interpretation of the congress' intent in its enactment of the Clayton Act.

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[25] It is apparent that the Court's finding - that there were many other analyzer and reagent manufacturers in the market - was at the bottom of its reasoning. The Court held that if Beckman's prices rose "too high", the customer's would then avoid Beckman - presumably to buy from others. 670 F.Supp. 1313 at 1319. Since they obviously had not avoided Beckman, *ergo,* Beckman's prices were not "too high". This does not account for the fact that Beckman competitors were offering their reagents at 80%-90% *off* Beckman's list price (i.e. at 10%-20% *of* list price) and got 5% or less of the business while Beckman under its ESP and ESP-10 plans was discounting its reagents at 25% (at most, 35%) *off* its list price (i.e. at 65% to 75% *of* list price) and maintained 95% or more of the reagent business. id at 1316, 1322 (AP: 408, note 8) However, other analyzer manufacturers kept only 45%-65% of their reagent after-market which is about half that maintained by Beckman. [AP: 1543] Similarly there was not dispute that reagents offered by others were considered to be of equal or better quality and rendered with equal or better service (Nobel). 670 F.Supp. 1313 at 1322 Yet, although priced much lower, the Hospitals did not buy

II. The Court below, in its evaluation of respondent's tying arrangements under the rule of reason, improperly ignored the plain meaning of the "harmful exercise of market power" as set out in Justice O'Connor's opinion in *Jefferson Parish*; tying arrangements that abet the avoidance of the payment of federal corporate income taxes is just such a harmful exercise unanimously condemned by this Court in *Jefferson Parish*

As noted, Beckman had adamantly insisted that Nobel's tying claims "must be judged under the rule of reason" and the Court below, relying principally on the separate opinion of Justice O'Connor to the opinion of this Court in *Jefferson Parish,* clearly acceded to Beckman's insistence and adopted that standard as its own.

However, assuming *arguendo,* that the rule of reason were an appropriate standard in the instant case, the Court below then failed to observe Justice O'Connor's actual teaching with respect to this rule. As Justice O'Connor pointed out, under the rule of reason, not this Court has specifically held in *Loew's, need not be shown. id.* at n. 4.

In sum, on what the Court below found to be an almost undisputed factual record, Nobel showed that Beckman's analyzers possessed each of the *indicia* of market power as set-out by this Court over the last forty years. Without appearing to disturb this underlying factual basis - although largely ignoring the facts when taken in the context of supporting the showing of Clayton 3/Sherman 1 market power - the Court below clearly acceded to Beckman's insistence that Nobel's tying claims must be judged under the rule of reason and required a showing that Beckman was a monopolist in a legally defined relevant market. That is to say, ultimately, the Court below held Nobel's Clayton 3/Sherman 1 *per se* tying claims to the Sherman 2 monopoly power standard. This is plainly contrary to this

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them. Amicus suggests that the reasonable inference would be that they did not want to pay 800% more for parts or feared for the loss of emergency hotline service, etc. Beckman euphemistically called this "encouraging" its customers to buy Beckman's brand of reagents. *See* notes, 20, 21 *supra.* Amicus suggest that a rational juror (if allowed to factually find for the presence of *market power* under Clayton 3/Sherman 1) could find this to be the very definition of the violation of the Clayton Act.

Court's most recent reaffirmation of the *per se* rule, as applied to the evaluation of tying arrangements, in *Jefferson Parish;* and it is also directly contrary to the Ninth Circuit's holding in *Digidyne,* also a Clayton 3/Sherman 1 tying case, which presented similar facts and the identical legal issue. 734 F. 2d. 1336 at 1338-1340.

The Court below has, in effect, now held that the Sherman 2 monopoly power standard *must* subsume the Clayton 3/Sherman 1 market power standard. The Ninth Circuit Court has, in effect, held only is the purpose of the antitrust laws' prohibition of tying arrangements meant to control the demonstrated exclusion of competition (in Justice O'Connor's opinion, adequately regulable under Sherman 2 without reference to the tying arrangement itself), but also tying arrangements that "abet the harmful exercise of market power" are to be held unlawful as well. 466 U.S. 2 at 35. In this case it was undisputed that it was Beckman's tying arrangements that allowed Beckman to avoid the payment of federal corporate income taxes because its reagents were manufactured in Puerto Rico and the profits escaped taxation. Beckman, quite plainly, transferred profits from the analyzers, on which (to some extent) they had been earned, to the reagents, where they clearly were not earned. Wholly apart from the obvious price discrimination[26] that is also operating here, this is plainly just such a "harmful exercise of market power" that was unanimously condemned by this Court in Jefferson Parish. 466 U.S. 2 n. 19 at 13; n. 3,4 at 35-36.

Under no one's view of "consumer welfare" or "economic efficiency'[27] has it ever been held that tying arrangements, that force U.S. hospitals to pay vastly inflated prices, are legally justified in order to allow a seller to escape federal corporate income taxation. Beckman's reagent competitors were damaged or destroyed and no

[26] There are about 6,000 U.S. hospitals. Almost half have less than 100 beds. However the large hospitals do the majority of testing and therefore have the greatest demand for reagents, although, they may like a small hospital, use but one analyzer. This is the classic price-discrimination scenario.

[27] As Justice White observed in *Fortner I,* see *Jefferson Parish.* 466 U.S. 2 n. 19 at 13, forcing a tied product seller to enter into the business of the tying product seller is not economically efficient - even if it were possible. In the instant case, some reagent manufacturers did try to offer some of the Beckman proprietary parts and some services to get around Beckman's "packages"; there is no evidence that any were at all successful or that any stayed in the market for any appreciable time. Amicus suggests that service contracts, proprietary parts for a computer-controlled

consumer was benefited in the slightest. On the contrary, U.S. hospitals were economically coerced[28]. U.S. hospitals, driven, as they are, to maintain their facilities to be consistent with constantly changing state-of-the-art technology, were clearly deprived of their free choice to purchase commodity supply items, competitive brands of reagents, on their merits.

Moreover, every consumer was damaged in the sense of having to make up the tax burden. Only Beckman benefited through both increased before-tax and after-tax profits. Beckman's justification for this: it is good will, i.e., its economic profits. Certainly a rational jury could find and amicus suggests, if allowed to, would have found that this does not make "economic sense" - in the same sense as this statement was used by this Court in *Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 106 S. Ct. 1348 at 1356.

Although it is apparent that there was every reason in the instant case not to grant summary judgment on Nobel's *per se* tying claims under Clayton 3 and/or Sherman 1, the Court below did not properly consider the "harmful" or "unreasonable" aspects of Beckman's tying arrangements under the rule of reason. Although the Court allowed that there was a genuine issue as to whether Beckman's sales tactics were proper (bothing test evaluations, etc.), the Court held that violation of Sherman 2 was a prerequisite to establish liability for these actions. 670 F.Supp. 1313 at 1318.

While the American economy is fundamentally driven, as it properly is, by the profit motive, nonetheless it is even more fundamentally a normative endeavor reflecting societal goals with

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fully-automated blood chemistry analyzer such as Beckman's ASTRA or the emergency hotline service that these emergency analyzers required for their ongoing operation are not duplicable in the same sense as this Court found credit to be in *Fortner II*. Clearly, "proprietary" in the instant case does not mean the same thing as "unusual" as in *Fortner II*.

[28] Health care currently accounts for about 11% of the GNP - up from 6.5% about twenty-five years ago and projected by the Health Care Financing Administration to reach 15% by the year 2000 even under the assumption of no major changes in laws or regulations - yet 35 million Americans effectively are still denied even basic medical care because of its high cost. See, Economist's Viewpoint, D.P. Rice, Hospitals, Vol. 62., No. 6 (March 20, 1988

their underlying rule structure. These rules, as enacted by the congress, reflect the basic values of the American society. Amicus suggests that the practices present in the instant case reflect exploitation not lawful competition. If there remains no objective legal standard, how are the lower Courts to know the difference?

Conclusion

For the foregoing reasons, amicus urges this Court to grant the Petition For Writ of Certiorari.

Respectfully submitted,

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CERTFICATE OF SERVICE

I, Howard Friedman, a member of the bar of the Supreme Court of the United States and attorney for Competitive Americas Project, Amicus Curiae, herein, hearby certify that on the _____ day of _____, 1988, pursuant to Rule 28, Rules of the Supreme Court, I served three (3) copies of the foregoing MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE on Beckman Instruments, Inc., respondent herein, by depositing such copies in the United States mail at Washington, D.C., with first-class postage prepaid, properly addressed to the post office address of Richard L. Horn, Esquire, the above-named Respondent's counsel of record, at Karon, Savikas & Horn, Ltd., 5700 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606.

All parties required to be served have been served.

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Date_____